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No. 05-1629

IN THE

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT OUT OF TIME

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MOTION FOR LEAVE TO FILE BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT OUT OF TIME

The California Public Defenders Association respectfully requests that the brief of the California Public Defenders Association as *amicus curiae* in support of respondent be allowed to be filed out of time. The brief was time-stamped as filed at 3:40 p.m. on November 20, 2006, and the Court's order required all briefs to be filed by 3:00 p.m. on that same day. The brief was late due to coordination issues from California, where we are located and where the brief originated from. Although, we submitted our brief to the printer at 1:30 p.m., when it arrived they informed us they would not be able to deliver the brief in time for it to be filed by the 3:00 p.m. deadline. Regrettably, we were not aware of the 3:00 pm deadline until the printer alerted us of that issue. We very sincerely apologize for the delay and we respectfully request leave to file the brief out of time.

Respectfully submitted,

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Dated: November 21, 2006

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BRIEF OF THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the California Public Defenders Association as *amicus curiae* in support of respondent Luis Alexander Duenas-Alvarez, with the written consent of the parties.[1]

[1] As required by Rule 37.6 of this Court, *amicus curiae* submits that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

With over 3,000 members, the California Public Defenders Association (CPDA) is the state's largest association of criminal defense attorneys. CPDA has been a national leader in continuing legal education for defense attorneys for over 26 years, and is only one of two organizations deemed by California to be an "automatically" approved legal education provider. Cal. Bus. & Prof. Code § 6070(b) (West 2000). CPDA attracts many private practitioners as associate members. CPDA's members are involved in both trial and appellate practice, and have knowledge and expertise in California criminal state law. Many of CPDA's clients are on parole or probation, or both. The California courts have granted CPDA leave to appear as *amicus curiae* in well over 30 California cases which culminated in published opinions. CPDA has also served as *amicus curiae* in the United States Supreme Court in cases involving criminal procedure issues. *See California v. Trombetta*, 467 U.S. 479 (1984); *Monge v. California,* 524 U.S. 721 (1998); *United States v. Knights,* 534 U.S. 112 (2001); *Lockyer v. Andrade,* 538 U.S. 63 (2003).

The California Public Defenders Association has substantial interest in the correct resolution of the question presented in this case, as this Court's decision will affect the rights of our clients and the practice of our members. We believe our brief can augment those presented by the parties and illuminate the history and nature of the California statute at the center of the current controversy. Thus, to assist the Court and to bring its attention to facts and analysis that have not already been presented by the parties, we respectfully submit this *amicus curiae* brief.

SUMMARY OF ARGUMENT

As its title makes clear, California Vehicle Code section 10851(a) prohibits the "Theft *and Unlawful Taking or Driving* of a Vehicle." Cal. Veh. Code § 10851(a) (West 2000) (emphasis added). The plain text of the statute indicates explicitly that, in clear contrast to other California statutes, section 10851(a) does not include an intent to steal as an element of the offense. Thus, since the enactment of its earliest precursors, the various formulations of section 10851(a) have all been interpreted to reach conduct that did not involve the intent to deprive another of property permanently.

Despite this long history and well-established California practice, petitioner's argument rests on the premise that section 10851(a) is a generic "theft offense" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(G). From this starting point, petitioner claims that because one who aids and abets an offense has committed that offense, section 10851(a) is necessarily a "theft offense" under the categorical test set forth in *Taylor v. United States*, 495 U.S. 575 (1990). But petitioner's initial assumption is mistaken. California courts have long made clear that section 10851(a) and its predecessors cover conduct outside the core definition of "theft," including joyriding, post-theft driving, and participating as an accessory after the fact. As a result, whatever this Court should decide about the relationship of aiding and abetting liability to the underlying offense in connection with other statutes, section 10851 does not meet the generic definition of a "theft offense" under the *Taylor* standard.

An intent to steal lies at the core of any "generic" definition of "theft." Section 10851(a), on its face, permits convictions "without intent to steal." *See* Cal. Veh. Code § 10851(a). And the history of section 10851(a) illustrates that California courts and prosecutors have used the statute to convict defendants when there is no intent to steal. For ex-

ample, courts have applied the section to reach brief, temporary interferences with property, such as a defendant occupying a car briefly while rummaging through the glove compartment, *People v. Score*, 120 P.2d 62, 64 (Cal. Ct. App. 1941), or a defendant failing to return a car to a used car dealer four hours after it was due to be returned, *People v. Hutchings*, 51 Cal. Rptr. 415, 416 (Cal. Ct. App. 1966). Courts have also applied the statute to joyriding, an offense that does not require the intent to steal the vehicle, but only the intent to deprive its owner of possession temporarily. *People v. Allen*, 984 P.2d 486, 490 (Cal. 1999). Moreover, the statute has been used to cover post-theft driving; violations for unauthorized *driving* of a vehicle when the act of *taking* could not be proven. *People v. Garza*, 111 P.3d 310, 346 (Cal. 2005). California courts have also held that the act of *driving* is a separate and distinct act from *taking* under section 10851 and can be charged even when the act of taking can no longer be charged because the statute of limitations for the theft offense has run. *People v. Cuevas*, 63 P.2d 311, 313 (Cal. Ct. App. 1936).

Furthermore, section 10851(a) also imposes criminal sanctions on aiders and abettors. The government argues that aiders and abettors are included in the generic definition of "theft offense." Pet. Br. at 10. However, in California, aiders and abettors can be held liable for acts that are natural and probable consequences of the principal crime. *People v. Prettyman*, 926 P.2d 1013, 1019-20 (Cal. 1996). Given the breadth of aiding and abetting liability under California law, aiders and abettors can be found liable for a violation of section 10851(a), without knowledge or intent to commit a theft. As a result, section 10851(a) is broader than the generic definition of "theft offense."

Finally, section 10851(a) also imposes criminal sanctions on accessories. Accessories under California Penal Code section 32, are defined as "accessories after the fact" and do

not have the same requisite criminal intent as principals. *See People v. Mitten*, 112 Cal. Rptr. 713, 715 (Cal. Ct. App. 1974); Cal. Penal Code § 32 (West 1999).

Each of these reasons provides an independent basis for sustaining the Court of Appeals' conclusion that section 10851(a) is broader than a generic "theft offense."

ARGUMENT

I. THE STATUTORY BACKGROUND OF SECTION 10851 INDICATES THE STATUTE COVERS LESS SERIOUS CRIMES THAN THEFT

California law includes a variety of statutes that criminalize conduct that falls within the classic definition of theft and larceny. California's theft statute, Penal Code section 484, provides: "Every person who shall feloniously steal, take, carry, lead or drive away the personal property of another ... is guilty of theft." Cal. Penal Code § 484(a) (West 2000). California also has a grand theft statute, California Penal Code section 487(d), that criminalizes theft of an automobile, regardless of the value. It provides, "Grand theft is theft committed . . . when the property taken is an automobile." Cal. Penal Code § 487(d) (West 2000).

As its title suggests, and its operative language confirms, California Vehicle Code section 10851 covers some such conduct, but also extends far more broadly. Section 10851(a) provides:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with *or without intent to steal* the vehicle, or any

> person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense and, upon conviction thereof, shall be punished by imprisonment in a county jail for not more than one year or in the state prison or by a fine of not more than five thousand dollars ($5,000), or by both the fine and imprisonment.

Cal. Veh. Code § 10851(a) (emphasis added).

As the italicized text makes clear, section 10851(a) diverges from typical theft statutes in that it does not require an intent to steal. California courts recognize this essential distinction between this statute and other "theft" statutes. In *People v. Orona,* 164 P.2d 769, 772 (Cal. Ct. App. 1946), the court contrasted section 503 - the precursor to section 10851(a) - with the statute criminalizing grand theft of automobiles (section 487(d)), noting that the former is a felony regardless of the intent to commit a theft. The California court stated:

> To constitute the offense prohibited by that section, it is not necessary to prove that it was the defendant's intention to steal the machine, or to permanently deprive the owner of his title thereto. The crime may be consummated when one takes and drives a vehicle, not his own, without the consent of the owner, 'with intent to . . . temporarily deprive the owner thereof of his . . . possession of such vehicle.'

Id. at 772 (quoting *People v. Zervas*, 142 P.2d 946 (Cal. Ct. App. 1943)).

Similarly, in *People v. Jeffries*, 119 P.2d. 190 (Cal. Ct. App. 1941), the court discussed the distinction between the statutes in deciding whether a defendant could be convicted

of grand theft if a jury did not find the defendant guilty of violating former section 10851. The court stated that the difference between the statutes is that grand theft requires a felonious taking of the property of another, whereas section 503 (the precursor to section 10851(a)) includes temporarily depriving the owner of possession of the vehicle, with or without the intent to steal the same. *Id.* at 194. The court concluded that section 503 was not a lesser included offense of grand theft because a defendant could violate section 503 without violating the grand theft statute. *Id.* In so holding, the *Jeffries* court stated, "Both in substance and in form the offenses charged are distinctly different." *Id.*

The placement of section 10851 in the Vehicle Code further suggests that the statute was intended to reach offenses that do not necessarily involve the criminal intent necessary for theft. Other statutes in the same chapter of the Vehicle Code address a range of offenses, many of which have nothing to do with theft. Like section 10851, some of these statutes themselves cover both theft and non-theft offenses within the same provision. For example, California Vehicle Code section 10855 addresses persons who lease or rent vehicles and fail to return them within five days after the time prescribed by the lease or rental agreement. *See* Cal. Veh. Code § 10855 (West 2000). Similarly, Vehicle Code section 10852 criminalizes the willful injuring or tampering with a vehicle, including the breaking or removing of any vehicle parts without the consent of the owner.[2] *See* Cal. Veh. Code § 10852 (West 2000). Likewise, Vehicle Code section 10853 criminalizes malicious mischief to a vehicle, such as setting an unattended vehicle in motion or manipulating the

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[2] Notably, section 10852 also covers both the theft and non-theft crimes. *See People v. Anderson*, 126 Cal. Rptr. 235, 239 (1975) (Legislature intended to expand statute to include tampering with vehicle, in addition to stealing or damaging car parts).

brakes. *See* Cal. Vehicle Code § 10853 (West 2000). While these statutes include criminal conduct, they tend to be wide-ranging, including vandalism, property crimes, and other non-theft offenses as well as theft. Section 10851 fits within this approach.

II. CALIFORNIA VEHICLE CODE SECTION 10851 APPLIES BROADLY AND COVERS CONDUCT OUTSIDE THE CORE DEFINITION OF THEFT

As explained in the Brief of *Amici Curiae* Professors of Criminal Law, any generic definition of a "theft offense" requires a level of criminal intent greater than intent to use property briefly and then return it. The statutory text and relevant California case law make clear that section 10851(a) applies to a range of conduct that falls below this level of criminal intent.

A. California Courts Have Construed Section 10851(a) and Its Precursors Broadly

California courts have held that section 10851(a) is broad enough to reach even a very brief deprivation of the vehicle from the owner. In *People v. Score*, 120 P.2d 62 (Cal. Ct. App. 1941), the defendant challenged his conviction for assault on the theory that his act of assault - striking a car owner who had grabbed him - had been self-defense. In upholding the assault charge, which depended on whether the defendant was committing a crime or just using self-defense, the court held that the defendant had violated an earlier (but materially identical) version of section 10851 because the owner found him sitting in the car, going through the glove compartment. *Id.* at 64. In doing so, the court noted that although there was no evidence that the defendant intended to steal the car, his conduct violated the statute because, "Tem-

porary possession may be for a day and it may be for less than a minute." *Id.*

Similarly, in *People v. Hutchings*, 51 Cal. Rptr. 415 (Cal. Ct. App. 1966), a defendant went to a used car dealer, expressed interest in purchasing a car, and asked permission to take if for 30 or 40 minutes to show it to his wife. The defendant was arrested for driving the same car while intoxicated, four hours later, 20 miles from the used car lot, and a substantial distance from his wife's home. *Id.* at 416. The defendant argued that he took the car with consent of the owner, and thus could not be guilty of a violation of section 10851. *Id.* The court held that even though there was not an "extended period of withholding" and the purpose for the use of the car was 'restricted", the defendant willfully drove the car "far beyond the scope of the original consent." *Id.* The court did not discuss whether the defendant intended to steal the car, but nevertheless affirmed his conviction for violating section 10851. *Id.*

The State's decision to proceed in *Hutchings* under section 10851(a), rather than under the theft statute (Penal Code section 484) or the grand theft statute for automobiles (Penal Code section 487(d)), indicates the breadth of the former statute and the limitation of the latter two. The case was viable only under section 10851 because, as noted above, that statute permits a conviction "with or without the intent to steal." Cal. Veh. Code § 10851(a). In contrast, under both sections 484 and 487(d), an intent to steal is an element of the offense. *People v. Matlock*, 51 Cal. Rptr. 2d 682 (Cal. Ct. App. 1959) (taking of property is not theft in the absence of intent to steal); *People v. Arriola*, 330 P.2d 683 (Cal. Ct. App. 1958) (to complete the crime of grand theft, intent to steal or take is necessary in addition to the actual stealing or taking).

B. Section 10851(a) Covers Joyriding

Until 1996, the principal statutory prohibition on "joyriding" resided in California Penal Code § 499b, which provided:

> Any person who shall, without the permission of the owner thereof, take any automobile, bicycle, motorcycle, or other vehicle or motorboat or vessel, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding four hundred ($400) dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment.

Cal. Penal Code § 499b (1983) (amended 1996).

Courts and commentators regarded section 499b as largely duplicative of California Vehicle Code section 10851(a), and observed that the redundancy of these sections created confusion among jurors called to apply the statutes. *See People v. James,* 203 Cal. Rptr. 716, 721 (Cal. Ct. App. 1984) (Dalsimer, J., concurring) (noting that the difficulty in distinguishing between the offenses led to juror "confusion," which had "been apparent for decades"). In *People v. Ivans,* 4 Cal. Rptr. 2d 66 (Cal. Ct. App. 1992), the court suggested that,

> [t]he Legislature should revisit the auto theft statutes and consider repeal, amendment or enactment of corrective legislation of these confusing statutes. Conceivably, one auto theft statute would suffice to cover the crime in California.

Id. at 72 n.7.

Responding to these concerns, the California legislature

amended section 499(b) in 1996, removing the words "automobile, motorcycle or other vehicle." The legislative history makes clear that the purpose of this change was, "to clarify and streamline existing law by deleting provisions in Section 499b of the Penal Code that are generally duplicative of provisions in subdivision (a) of Section 10851 of the Vehicle Code." Cal. Stat. 1996, ch. 660, § 3 (quoting Assembly Bill No. 3170); *see also People v. Howard,* 66 Cal. Rptr. 2d 849, 851 (Cal. Ct. App. 1997) (discussing the legislative intent behind amending section 499b and also quoting Assembly Bill No. 3170). The legislators who amended section 499b noted that the "amendments to Section 499b of the Penal Code shall not be construed as evidencing a legislative intent to eliminate a crime." Cal. Stat. 1996, ch. 660, § 3.

Therefore, the Legislature's clear directive that joyriding is to be charged under section 10851(a) indicates that section 10851(a) covers conduct broader than the core definition of theft. As the California Supreme Court stated in *People v. Allen,* 984 P.2d 486 (Cal. 1999), "Vehicle code section 10851 can be violated either by taking a vehicle with the intent to steal it *or* by driving it with the intent to only to temporarily deprive its owner of possession (i.e., joyriding)." *Id.* at 490 (emphasis added).

C. California Courts Apply Section 10851(a) To Driving A Stolen Vehicle, Even When The Act Of Taking Cannot Be Proved Or Charged

California has long recognized section 10851(a) as a broad statute that can be used to convict a person of unlawfully *driving* a stolen vehicle, even when the act of *taking* cannot be proven for whatever reason. As the court stated in *People v. Frye,* 34 Cal. Rptr. 2d 180 (Cal. Ct. App. 1994), "There is no question that Vehicle Code section 10851 can be violated simply by the act of *driving* a car without the

owner's consent; the defendant need not have committed the original act of taking the car from the owner." *Id.* at 184-85 (citing *People v. Mamlamut*, 93 Cal. Rptr. 782, 784-85 (Cal. Ct. App. 1971)); *People v. Cuevas*, 63 P.2d 311 (Cal. Ct. App. 1936); *People v. Jaramillo*, 548 P.2d 706, 710 n.6 (Cal. 1976)).

In *People v. Jaramillo*, the California Supreme Court stated: "Vehicle Code section 10851 proscribes a wide range of conduct." 548 P.2d at 709. "[T]he statute recognize[s] that the section prohibits driving as separate and distinct from the act of taking." *Id.* at 710 n.6; *see also People v. Strong*, 35 Cal. Rptr. 2d 494, 497 (Cal. Ct. App. 1994); *People v. Cratty*, 91 Cal. Rptr. 2d 370, 373 (Cal. Ct. App. 1999); *People v. Garza*, 111 P.3d 310, 346 (Cal. 2005).

In *Strong*, the defendant was arrested while driving a stolen pickup truck. The court of appeal stated that the evidence at trial conclusively proved that the defendant had *driven* the pickup, but there was less substantial evidence that the defendant had *taken* the pickup. *Strong*, 35 Cal. Rptr. 2d at 497. Moreover, because four days had elapsed between the taking and the defendant's arrest while driving the vehicle, the taking and the driving were "two distinct" violations of section 10851. *Id.*

Likewise, in *People v. Cratty*, the defendant was convicted of violating section 10851 based on evidence that a California Highway Patrol officer had stopped and arrested the defendant as he was driving a car that had been stolen eight months earlier. The court of appeal reasoned that because it was undisputed that the defendant drove the car, "the jury must have at least found that defendant violated the (nontheft) 'driving' provision of section 10851(a)." *Cratty*, 91 Cal. Rptr. at 373.

Also, in *People v. Garza*, the defendant was found at a strip mall parking lot in the driver's seat of a car that had

been stolen six days earlier. The defendant offered no evidence suggesting any other person might have driven the car to that place. The court stated that, "The only reasonable inference that a juror could draw from the evidence at trial . . . was that defendant had driven the car there." *Garza,* 113 P.3d at 346. Consequently, the court held that, "The theft of the vehicle six days earlier was long since complete and the driving therefore constituted a separate, distinct, and complete violation of section 10851(a)." *Id.*

Even long after the statute of limitations has run for the crime of "taking," section 10851 can be used to charge the crime of "driving". In *People v. Cuevas*, a defendant was convicted of a violation of Section 503 (now Section 10851) four years after the vehicle was taken. 63 P.2d at 312. The defendant argued that the three-year statute of limitations barred his conviction. Evidence at trial showed the defendant had stolen the vehicle on March 29, 1932 and continually possessed it for four years. *Id.* at 153. The court affirmed the conviction, reasoning that though a conviction for the taking was time-barred, taking and driving were distinct crimes:

> . . . from a consideration of the definition of the crime of theft, as is set forth in section 484 of the Penal Code, it is clear that the offense of unlawfully driving an automobile (sec. 503, Vehicle Code) may be quite distinct from that of stealing one; consequently, that the assumed fact that on the date when the information was filed in the instant matter, the statute of limitations had run as against a case of theft, would not necessarily be determinative of the charge of unlawfully driving an automobile.

Id. In reaching its decision, the court emphasized the alternative language of section 503, which remains in Section

10851, that the statute operates against any person who "drives or takes a vehicle." *Id.* at 313. Because the taking and the driving are separate crimes and the theft had been fully completed, the court held that the act of driving the car, still without permission of the owner, was a separate crime of unlawful driving. The court stated that, "[w]ithout the consent of the owner of the automobile, each time that defendant so drove it was in violation of the provisions of the statute." *Id.*

Thus, by affirming convictions of driving a stolen vehicle, even when the act of taking could not have been proved or charged under section 10851(a), California courts have reinforced what the statutory language already makes clear -- that California Vehicle Code section 10851(a) broadly encompasses conduct other than theft.

III. SECTION 10851 ALSO COVERS AIDING AND ABETTING, WHICH IS INTERPRETED BROADLY UNDER CALIFORNIA LAW, FURTHER ILLUSTRATING THE STATUTE IS BROAD AND COVERS CONDUCT BESIDES THEFT

California Vehicle Code section 10851(a) can be violated if "a party or an accessory to or an accomplice" participates in the unauthorized taking or driving of a vehicle. Cal. Veh. Codes § 10851(a); *see also People v. Miles*, 77 Cal. Rptr. 89, 93 (Cal. Ct. App. 1969) (sustaining conviction under section 10851 of defendant that was passenger in stolen vehicle); *People v. Rinehart*, 290 P.2d 600, 601 (Cal. Ct. App. 1955) (upholding conviction of defendant as accomplice because he was found in driver's seat of stolen car and knew or should have known it was stolen). The inclusion of accomplices in section 10851 further suggests that the statute should not be interpreted as categorically a theft offense because "aiding and abetting liability in California 'is quite

broad.'" *Martinez-Perez v. Gonzalez*, 417 F. 3d 1022, 1027 (9th Cir. 2005) (citation omitted).[3]

In California, under the natural and probable consequences doctrine, an accomplice can be held liable for acts of which the accomplice was unaware, so long as those acts were "natural and probable consequences" of acts of which the accomplice *did* have knowledge. *See People v. Beltran*, 210 P.2d 238, 242 (Cal. Ct. App. 1949) (holding that "'persons who aid and abet in the commission of a criminal offense, though not being present, are liable for all the natural and probable consequences incident to the commission of the act which they have counseled or advised'" (citation omitted)); *People v. Beeman*, 674 P.2d 1318, 1326 (Cal. 1984) (liability of an aider and abettor extends also to natural and reasonable consequences of acts he knowingly and intentionally aids and encourages); *People v. Croy*, 221 Cal. Rptr. 592, 597 (Cal. Ct. App. 1985) (defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator); *People v. Nguyen*, 26 Cal. Rptr. 2d 323, 333 (Cal. Ct. App. 1993) (holding that sexual offenses were reasonably foreseeable result of defendants' participation in robbery of tanning salon).

The California Supreme Court in *People v. Prettyman*, 926 P.2d 1013 (Cal. 1996), discussed at length the origin and scope of the natural and probable consequences doctrine in California:

> Under California law, a person who aids and abets a confederate in the commission of a criminal act is liable not only for that crime (the target crime),

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[3] The California statute concerning accomplices is section 31 of the California Penal Code. It states that "[a]ll persons ... [who] aid and abet in [the] commission [of a crime ... are principals in any crime so committed." Cal. Penal Code § 31 (West 1999).

> but also for any other offense (nontarget crime) committed by the confederate as a "natural and probable consequence" of the crime originally aided and abetted. To convict a defendant of a nontarget crime as an accomplice under the "natural and probable consequences" doctrine, the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a "natural and probable consequence" of the target crime that the defendant assisted or encouraged.

Id. at 1015. The court in *Prettyman* acknowledged that the "natural and probable consequences" doctrine has been "subjected to substantial criticism", but noted that nevertheless, it is an "established rule". *Id.* at 1019 (quoting Dressler, *Understanding Criminal Law* § 30.05, p. 427 (1987); *see also* 2 LaFave & Scott, *Substantive Criminal Law* § 6.8, p. 159 (1986)). In a concurring opinion in *People v. Luparello*, 231 Cal. Rptr. 832 (Cal. Ct. App. 1986), Judge Wiener criticized the natural and probable consequences rule, noting

> The major fallacy I see in the "foreseeable consequence" doctrine is not so much that it attributes an unintended act to the accomplice/co-conspirator but rather that it assesses the degree of his culpability for that act not by his own mental state but rather by the mental state of the perpetrator and/or the circumstances of the crime. . . . In our means-oriented society, to have the end alone justify the punishment is unconscionable.

Id. at 859-60 (J. Wiener, concurring).

People v. Nguyen, 26 Cal. Rptr. 2d 323, illustrates the potential breadth of the scope of the natural and probable consequences doctrine. In *Nguyen*, eight men robbed a tanning salon, threatened the owner with guns, and pinned her to the floor. *Id.* at 327. While pinned to the floor, one of the robbers used sexual assault as part of a threat to convince the owner to surrender her valuables. *Id.* These same individuals went on to rob a local spa, but this time, one of the robbers fondled and sexually violated the owner. *Id.* The perpetrators that did not commit the sexual acts were convicted of robbery and of aiding and abetting the sexual assaults. *Id.* at 326. On appeal, they argued that the forcible sexual acts were neither reasonably foreseeable nor the natural and probable consequence of robbery. *Id.* at 328-29. However, the court found ample evidence that the sexual offenses were a reasonably foreseeable result of the defendants' participation in the robbery, especially because they were charged with two different assaults. *Id.* at 332.

Therefore, as illustrated by these cases, because aiding and abetting liability is applied particularly broadly in California, a person who aided and abetted in the commission of a non-theft crime could end up being convicted for a section 10851(a) violation, even if they did not intend to commit "theft" under the statute.

IV. SECTION 10851 ALSO APPLIES TO ACCESSORIES AFTER THE FACT, WHOSE CONDUCT MAY NOT INVOLVE A THEFT OFFENSE

Section 10851 makes it a crime to be an "accessory" in the driving or unauthorized taking or stealing of a vehicle. Cal. Veh. Code § 10851. This aspect of the statute further indicates that it covers conduct beyond theft. Because "ac-

cessories" in California are only "accessories after the fact," and are not liable for the crime of the principal, their conduct plainly may fall outside the scope of a generic theft offense.

Under California law, an "Accessory" is defined under Penal Code section 32 as:

> Every person who, after a felony has been committed, harbors, conceals or aids a principal in such felony, with the intent that said principal may avoid or escape from arrest, trial, conviction or punishment, having knowledge that said principal has committed such felony or has been charged with such felony or convicted thereof, is an accessory to such felony.

Cal. Penal Code § 32 (West 1999). Notably, the title of section 32 - "Accessories defined" - indicates that "accessories" are "accessories after the fact." This approach is consistent with California's elimination of the common law categories of "accessories before the fact" and "accessories after the fact." As noted in *People v. Mitten*, 112 Cal. Rptr. 713 (Cal. Ct. App. 1974):

> One who would have been an "accessory before the fact" is now a principal to the offense. . . . And, as we have stated, one who would formerly have been an "accessory after the fact" is now guilty as an accessory, a crime separate and distinct from the principal offense.

Id. at 715 (citations omitted).

The government argues that the word "accessory" in section 10851 does not necessarily have the same meaning as the term "accessory" in section 32. Pet. Br. 29. But, the government provides no convincing reason for treating the identical term differently. Nor does the government suggest an alternative meaning to the word "accessory" in section

10851. California courts hold there is a clear distinction between "accessories" and "aiders and abettors." *See Mitten*, 112 Cal. Rptr. at 715. As explained by the California Supreme Court in *People v. Horton*, 906 P.2d 478, 506 (Cal. 1995), "[a] mere accessory . . . is not liable to prosecution for the identical offense, and therefore is not an accomplice." *Id.* In *People v. Coffman*, 96 P.3d 30 (Cal. 2004), the Supreme Court further elaborated on the difference between an accomplice and an accessory noting, an accomplice "[i]s liable to prosecution for the identical offense charged against the defendant on trial," while an accessory is,

> defined as persons who, after a felony has been committed, harbor, conceal or aid a principal in the felony with the intent that the principal avoid criminal liability therefor and knowing that the principal has committed the felony or been charged with or convicted thereof.

Id. at 108; *see also United States v. Innie*, 7 F.3d 840, 852 (9th Cir. 1983) (noting the distinction of accessory after the fact from aiding and abetting, stating, "Unlike one who aids and abets a crime of violence, an accessory after the fact does not aid in the commission of the offense").

One can only conclude that that the word "accessory" appears in 10851, along with the word "accomplice," because the Legislature intended for it to cover conduct separate and distinct from aiding and abetting. Because section 10851 applies to accessories after the fact, it therefore applies to conduct without the requisite intent to commit a theft.

CONCLUSION

For all the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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